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Supreme Court, U.S.
FILED

MAY 8 - 2008

OFFICE OF THE CLERK
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No. 08- 08-79

IN THE

Supreme Court of the United States

LARRY EDWIN RASCO,

Petitioner,

v.

JOHN POTTER, Postmaster General,
United States Postal Service,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the United States Postal Service precluded from terminating Rasco based on "progressive discipline" when Rasco had a pending EEOC complaint that had not been resolved.

2. Whether Defendant United States Postal Service violated Rasco's contract rights and due process rights when it terminated him?

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Petitioner, Larry Edwin Rasco, files this Petition for Writ of Certiorari requesting that this Honorable Court review the Judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Southern District of Texas, Houston Division.

OPINIONS BELOW

A copy of the unpublished opinion of the United States Court of Appeals for the Fifth Circuit, dated February 8, 2008, affirming the decision of the United States District Court for the Southern District of Texas, Houston Division, is attached as Appendix A.

A copy of the unpublished Memorandum and Order of the United States District Court for the Southern District of Texas, Houston Division, dated January 4, 2007, is attached as Appendix C.

A copy of the decisions of the United States Equal Employment Opportunity Commission, dated September 27, 2005, is attached as Appendix C.

STATEMENT OF JURISDICTION

This is a civil appeal from a Decision of a United States District Court and a Federal Circuit Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The District Court had jurisdiction over Petitioner's claims under 28 U.S.C. § 1333. Appeal was properly taken by Petitioner to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291 and Rule 4 of the Fed. R. App. Proc.

Petitioner should have received the benefit of 5 U.S.C. § 75 procedure before the United States Postal Service terminated him after 28 years of employment.

SUMMARY OF THE CASE

Petitioner Rasco asserts that the disciplinary actions taken against him by the United States Postal Service that lead to his termination were arbitrary and capricious, and that they were based on discrimination and retaliation against him by management for his prior EEO activity, and that the United States Postal Service deprived him of his rights under 5 U.S.C. § 75 before he was terminated.

Petitioner Rasco is a Caucasian male who worked for the Postal Service for more than twenty-nine years when he was removed from his position as Expeditor for the United States Postal Service.

Petitioner Rasco alleged that he suffered the adverse employment action of termination based on race, and that he has been retaliated against by the same USPS Management officials based on his prior EEO activity.

Petitioner Rasco alleged that Acting MDO Melchor, MDO Ray Lozano and SDO Phil Arredondo, who were all Hispanic, discriminated and retaliated against him, because of his prior EEO filing(s).

Petitioner Rasco alleged that he received disparate treatment when he, but not two Hispanic employees (Lopez and Gomez), was removed from his position and placed on leave without pay.

Petitioner asserted in the underlying case that the Union breached its duty of fair representation when it failed, at the Arbitration hearing, to object to the entry into the record of prior attempts to terminate Petitioner that were either stale, and/or were rescinded and/or reduced, and failed to get the following facts in the arbitration record as infractions of the contract:

a. Petitioner had suffered ongoing discrimination and retaliation against him, by management of the USPS, North Houston Processing and Distribution.

b. Postal Service issued a removal that was not progressive, as there was not a 14-day suspension as a past element, which was a direct violation of management's Handbook EL-921.

c. Postal Service management improperly cited a past element, a 7-day suspension dated February 5, 2002, which had been reduced to a letter of warning on July 19, 2002.

d. It was a violation of #1 on Page 7 of the JCAM, Tab 2, P. 9 Postal Service was allowed to cite a past element that had been reduced.

e. It was a violation of Rasco's due process rights for past elements dated February 5, 2002, January 11, 2002 and June 29, 2001 to be cited in Petitioner's arbitration hearing as they were not related to the removal charge and therefore were not "progressive" in nature.

f. Rasco never served the suspension dated June 29, 2001, and it was prejudicial, and should not have been allowed to be cited as a past element in Rasco's removal.

g. The Postal Service failed to conduct a fair and impartial investigation, as the pre-disciplinary hearing was held on July 29, 2002, and concurred on the same day.

h. The Postal Service implemented a disciplinary action that was not proposed or concurred. The Form 1080 reveals that only a 14-day suspension was requested, but a removal was issued.

i. The emergency procedure action Article 16.7 issued to Grievant in conjunction with his removal was sustained in USPS grievance #GOOC-IG-D 02236144 proving that Charge #3, improper conduct/failure to follow instructions had no merit.

j. Charges #1 and #2 do not warrant a removal, and the discipline is too harsh, punitive and not corrective as required.

k. Rasco was never given an instruction not to go to or be in the label room. Being in the label room was part of his job. Rasco further asserted that he followed all "supervisory instructions", and that the discipline brought by Melchor was untimely and arbitrary and capricious, since he had never been given a direct order not to go to or be in the label room.

l. The time frame for taking discipline on the alleged incident in the third notice of removal dated April 21, 2004 had expired. There was never any proof of the allegations that Rasco was using the label room for a break on either April 21, 2004 or on May 10, 2004.

m. When the Union did not submit into evidence Rasco's entire statement in the arbitration proceeding, including the Union case and settlement documentation involving Melchor, and the long history of Melchor's continuous harassment of Rasco, Rasco was extremely prejudiced, because the arbitrator did not know the relationship between Rasco and Melchor, the management official who had signed off on the discipline to terminate Rasco. The arbitrator did not take into consideration evidence that was not introduced in the hearing itself.

n. Rasco asserts that Arbitrator Sherman found that the alleged offense, was relatively minor, but nevertheless, he found in favor of the Postal Service, and sustained the termination based on, "the totality and persistence of his misconduct that undermined the very mitigating factors that would have otherwise guaranteed his reinstatement". Rasco asserts that had Arbitrator Sherman been afforded the opportunity to see Rasco's statement, and the Union case file and settlement documents involving Melchor, and the long history of Melchor's continuous harassment of Rasco, that he would not have made the decision to remove him from his job. Because the documents were not introduced by the Union at Step II, as requested by Rasco, Rasco could not testify to them at the hearing, and the evidence was not allowed as part of the arbitration record.

Petitioner Rasco asserted in the underlying case that the United States Postal Service did not terminate him for "just cause", that USPS failed to prove that there was "progressive discipline" before it terminated him, and that his due process rights were violated.

Specifically, Petitioner Rasco asserts the following:

(1.) That due to the ongoing discrimination and retaliation against him, by management of the USPS, North Houston Processing and Distribution, he was terminated.

(2.) That the removal was not progressive, because there was not a 14-day suspension as a past

element, which was a direct violation of management's Handbook EL-921. [USCA5 203-205];

(3.) That management improperly cited a past element, a 7-day suspension dated February 5, 2002, which had been reduced to a letter of warning on July 19, 2002, and the mutual settlement should have been the citeable past element;

(4.) That the citing of a previous element is a violation of #1 on Page 7 of the JCAM;

(5.) That past elements dated February 5, 2002, January 11, 2002 and June 29, 2001 are not related to the removal charge and therefore are not progressive in nature and should not have been considered in the termination proceeding;

(6.) That he never served the suspension dated June 29, 2001, therefore it was improper to cite it as a past element;

(7.) That the predisciplinary hearing was held on July 29, 2002 and concurred on the same day, therefore there could not have been a fair and impartial investigation;

(8.) That the Form 1080 reveals that only a 14-day suspension was requested, but a removal was issued, a disciplinary action that was not proposed or concurred;

(9.) That the emergency procedure action Article 16.7 issued to Grievant in conjunction with this action was sustained in USPS grievance #GOOC-1G-D 02236144 proving that Charge #3, improper conduct/failure to follow instructions has no merit;

(10.) That Charges #1 and #2 do not warrant a removal, and the discipline is too harsh, punitive and not corrective;

(11.) That management did not conduct a fair and impartial investigation, fatal error of the seven tests of just cause;

(12.) That the Applicable Contract Law is Article 16, Section 1:

> ". . . Discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause . . ."
>
> ". . . any such discipline or discharge shall be subject to the grievance-arbitration provided for in this agreement, which could result in reinstatement and restitution, including back pay."

(13.) That the Postal Service neither cited nor considered any aggravating elements of past record for his termination.

(14.) That the Postal Service fired Clerk Rasco for a single act of alleged misconduct. [App. J.].

(15.) That the Postal Service issued a removal that was never proposed by the immediate supervisor and was never concurred by a higher level management official as required by the National Agreement.

(16.) That the Postal Service violated Petitioner's contract rights as a long time Postal employee; and

(17.) That the Postal Service violated Petitioner's due process rights and other Federal employment rights.

STATEMENT OF THE CASE

1. CONSIDERATION MAY NOT BE GIVEN TO PRIOR DISCIPLINARY ACTIONS THAT ARE THE SUBJECT OF ONGOING PROCEEDINGS CHALLENGING THEIR MERITS, BECAUSE IT WOULD RISK HARMING THE LEGITIMACY OF THE REASONABLE PENALTY ANALYSIS BY ALLOWING THE USE OF UNRELIABLE EVIDENCE TO SUPPORT AN AGENCY ACTION.

The goal of discipline is to correct the misconduct and to modify the behavior, rather than to punish the employee. The facts in this case establish that the employee did not do the things claimed, and that he is innocent until proven guilty by a preponderance of the

evidence. If the rule has not been enforced consistently, as in this case, then the discipline against Petitioner was discriminatory and arbitrary. In this case, Clerk Rasco's behavior did not violate an established rule, regulation or requirement, and therefore the disciplinary action should be reversed on review. Even the agency called the infractions trivial.

In his deposition taken on June 14, 2006, Petitioner Rasco testified to the following:

1. That he had worked for the Postal Service for 29 years at the time when he was removed from his job as an Expediter.

2. That As part of my job as an Expediter of the mail, Rasco would go to the label room on a daily basis to get labels that we used to identify dispatch containers. Each unit in the plant had a case of labels that he would refill on a daily basis. It would usually take from 5 - 15 minutes to get the labels.

3. That "Expediters from other units and Rasco and Roger Lopez and other Expediters from Petitioner's unit would also meet in the label room around 12:00 each night for a conference type meeting. There was probably four to six Expediters that usually went to the label room around 12:00 each night. The Expediters had to stay in touch with each other as they made their dispatches of the mail.

4. That the Expediters had a file cabinet in the label room where we kept our tools that we used, such as clipboards and pens, and also for a long time where we kept our radios.

5. That the label room was close to the 010 unit and the open dock where I would make my Houston dispatches was 30-50 feet from the label room.

6. That at the time of his removal, the only live discipline in my file was a 14-day suspension that was the reduction of the first removal action.

7. That for the second removal action, Rasco was disciplined for something that was not a disciplinary issue. It was supposedly issued for failure to follow instructions, however the charge does not state any specific instruction that he failed to follow.

8. That for the second removal action, Rasco was disciplined for something that was not a disciplinary issue. It was supposedly issued for failure to follow instructions, however the charge does not state any specific instruction that Rasco failed to follow.

9. That Rasco was not given an instruction to not go to the label room. It was part of my job to go to the label room.

10. That the label room was a sort of an office for Expediters and label clerks.

The Agency must prove all elements of the charged conduct. The Agency must prove a nexus between the misconduct and the efficiency of the service. The burden is on the agency to prove that taking disciplinary action in this case, in some way, promoted the efficiency of the service. In order to prove nexus, an agency must show a clear and direct relationship between the misconduct

and the work of the agency, i.e. that the employee's misconduct adversely impacts on either the employee's ability to accomplish his duties satisfactorily or some other legitimate governmental interest promoting the "efficiency of the service." *Brown v. Department of the Navy*, 229 F.3d 1356 (Fed. Cir. 2000), *cert. denied*, 533 U.S. 949 (2001). It is difficult to see how being in the label room, when that was part of his work duties and was customary among the Expeditors, was a punishable offense, or promoted the efficiency of the service in any way. There simply is no nexus between the alleged misconduct and the efficiency of the service.

Petitioner did not have a live 14-day suspension for an event that took place on April 21, 2004. He was given a discussion. No official discipline was issued to Mr. Rasco for this incident. It was therefore improper for management to mention it as a disciplinary issue in the notice of removal effective July 16, 2004, and is tantamount to issuing discipline without the Clerk having the right to dispute discipline with the grievance procedure and in violation of 5 U.S.C. § 75. Additionally, management adding this as a prior incident for justification of removal is a violation of Petitioner's due process and a violation of 5 U.S.C. § 75.

Arbitrator Dorshaw's statement that Clerk Rasco was to demonstrate a satisfactory level of performance by following all supervisory instructions in order to keep his job with the Postal Service, since any subsequent notice of removal for future infractions of the same nature would clearly meet the progressive discipline test, did not give management the right to charge Clerk Rasco with an infraction without justification. Clerk

Rasco denies that he committed a "similar infraction", and asserts that the allegation of an infraction was without justification and/or basis. All evidence indicated that Clerk Rasco had a right to be in the label room as part of his job duties on May 10, 2004, when MDO Melcher observed him tying his shoe as he sat at the desk in the label room utilized by the Expeditors.

All evidence of record indicates that Clerk Rasco had worked for the Postal Service for twenty-nine years, that he performed his job well, that he had been in supervisory positions, that he had been called upon to train other employees, that for the most part, he got along well with other employees and was helpful to them, and that he was a dependable employee.

It is difficult to conceive how Petitioner's being in the label room affected his ability to perform his assigned duties in any way. The record indicates that the dock where Petitioner was to go to discharge his Expeditor duties concerning the Houston dispatches was very close to the label room, and that frequently the Expeditors waited in the label room for the time for the dispatches to go out.

Since Petitioner was entitled to be in the label room as part of his duties, and since it was customary for the Expeditors to be in the label room while waiting for dispatches and while carrying out other Expeditor duties, Petitioner was not on notice that he was violating any rule.

Petitioner was not a habitual violator of any rules of the Postal Service. He had worked for the Postal Service

for twenty-nine years. It was only toward the end of his career that he began to have trouble with management after he filed EEO complaints against management officials to protect his rights. Petitioner had no reason to be rehabilitated.

Petitioner's penalty of removal was far more harsh than any penalties against the Hispanic male Expeditors Lopez and Gomez who were Petitioner's comparisons. It is evident that the penalty against Petitioner of removal was arbitrary and capricious.

Petitioner claims the mitigating factors that he was discriminated against on the basis of race and retaliated against continuously at least since 2002 on the basis of filing EEO Complaints, and that it was not taken into consideration during the arbitration, because the Union did not timely submit his package at Step 2, therefore it could not be introduced in the hearing.

Petitioner asserts that consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits, because it would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence to support an agency action.

In this case, the employee can show that the Agency's decision was infected by "harmful error in the application of the Agency's procedures," due to a specifically prohibited employment practice such as discrimination, 5 U.S.C. § 7701(c), therefore the Agency's designated penalty should be altered if the penalty is found to exceed the bounds of reasonableness.

Decisions that are found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule or regulation having been followed, or (3) unsupported by substantial evidence can be altered. 5 U.S.C. § 7703(c). Upon review by the Court, if the severity of the punishment appears totally unwarranted, then it should be altered by the Court. *Hagmeyer v. Department of Treasury,* 757 F.2d 1284-1285. Any material aspect of the employee's disciplinary record that has not been developed in accordance with key due process protections is subject to de novo review.

In Clerk Rasco's case, the Agency used unreliable evidence to attempt to support its position, it violated his due process right to his protected property interest in his employment, its penalty of removal was arbitrary, capricious, an abuse of discretion and was unsupported by substantial evidence, therefore the penalty is unreasonable and should be altered by this Court.

The testimony of SDO Arredondo (Hispanic male) that he did not give Roger Lopez (Hispanic male) discipline for being in the label room with Rasco (Caucasian male) raises a prima facie case of race discrimination, because SDO Arredondo and Roger Lopez are both Hispanic males, and because Rasco was treated differently and more harshly than Lopez. Arredondo claimed that he did not witness Lopez in the label room, however, Arredondo did not witness Rasco in the label room on the removal date of September 9, 2002, yet SDO Arredondo conducted a pre-disciplinary interview with Rasco and issued a notice of removal in the presence of Bill Smith (Caucasian male) as an

attempt to convince the trier of fact in this case that it was not racial discrimination. SDO Bill Smith merely issued the notice of removal to clerk Rasco even though all of the charges of the removal involved SDO Arredondo (a Hispanic male) and MDO Lozano (a Hispanic male). Arredondo conducting a pre-D on Rasco, and then not conducting a pre-D on Lopez for the identical charge, is disparate treatment on the basis of race.

The alleged infraction of being in the label room in the first place is not a disciplinary issue since both Lopez and Rasco are allowed to go to the label room at their discretion while conducting their Expediter duties. Mr. Lopez had a previous incident of being in the label room and receiving disciplinary action. Mr. Lopez was given a 7-day suspension by SDO Mohammad Sullivan for being in the label room on the same day and at the same time as Mr. Rasco in regard to Charge #1 on the notice of removal dated September 9, 2002 issued to Rasco. Mr. Lopez's discipline was reduced or even expunged from his record, because management agreed that the Expeditors had a right to be in the label room at their discretion.

It is the Expeditors duty to schedule his/her time to the schedule of the dispatches. It was common practice for the Expeditors to go to the label-room at around midnight every day with regard to the Charge #1 incident which was the basis of the removal dated September 9, 2002, and it was still common practice for the Expeditors to go to the label room everyday around midnight with regard to the charge on the notice of removal effective July 16, 2004.

The fact that the discipline issued Clerk Lopez (Hispanic male) was dropped, and the fact that Clerk Rasco received the harsher discipline of removal, for the same allegation, is evidence of racial discrimination against Clerk Rasco. This scenario at raises the material fact issue of race discrimination to be presented to a jury that precludes a grant of summary judgment in this case.

USPS Summary Judgment Exhibit 9, Page 5 [App. F], states that Mr. Gomez (Hispanic male) was observed in the label room on May 10, 2004, but he received an investigative interview, not a pre-disciplinary interview by SDO Phil Arredondo (Hispanic male). SDO Phil Arredondo was not Mr. Gomez's supervisor, but he claims justification for not issuing Lopez discipline, because he did not see Lopez in the label room. On the otherhand, management attempts to justify issuing discipline to Rasco (Caucasian male) for the same alleged infraction that was rescinded for Lopez (Hispanic male) by claiming that SDO Wagner (Caucasian male) actually witnessed Clerk Rasco (Caucasian male) in the label room even though evidence (Union's record of Pre-D) states that MDO Melcher witnessed Rasco in the label room. All of this is a pretext. The evidence here, and at trial, will show that Clerk Rasco (Caucasian male) was alleged to have committed the same infraction as Clerk Lopez (Hispanic male), and Clerk Lopez's discipline was rescinded, whereas Clerk Rasco was removed from his position at the Postal Service after twenty-nine years of service.

The above evidence in the summary judgment record supports Petitioner Rasco's allegations that the

United States Postal Service, through its agents, discriminated against him and harassed him for filing his prior EEOC Complaint(s), and continuously discriminated against him on the basis of race to the extent that it caused him to suffer removal on the basis of race as a result of reprisal discrimination.

Petitioner has satisfied the burden on a summary judgment motion to present that there is a genuine issue of material fact for resolution by the trier of fact. In *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 US. Lexus 3966 (June 12, 2000), the Supreme Court found that evidence of a false pretext is sufficient evidence of discrimination because "in appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." In that case, the Court found that a jury's finding that the falsity was sufficient evidence to find in favor of the complainant was a reasonable inference. Respondent was not able to controvert Petitioner's evidence at the lower level, and therefore it's Motion for Summary Judgment should have been denied.

REASONS FOR GRANTING THE PETITION

Many Postal employees who are close to retirement have been terminated based on flimsy pretextual reasons when their contract rights and due process rights have been violated. Postal employees who are not veterans cannot go to the Merit System Protection Board when they are terminated and they have no avenue of redress as to their rights under 5 U.S.C. Chapter 75 and other Federal Rules and Regulations.

All Federal employees should be entitled to have the provisions of 5 U.S.C. Chapter 75 applied to them at all times. This is a ripe issue and it affects thousands of Federal employees today.

CONCLUSION

Petitioner's removal issued was not progressive, because there was not a 14-day suspension as a past element, which was a direct violation of management's Handbook EL-921.

Management improperly cited a past element, a 7-day suspension dated February 5, 2002, which had been reduced to a letter of warning on July 19, 2002, and the mutual settlement should have been the citeable past element.

The citing of a previous element was a violation of #1 on Page 7 of the JCAM.

Past elements dated February 5, 2002, January 11, 2002 and June 29, 2001 were not related to the removal charge and therefore were not progressive in nature.

Petitioner never served the suspension dated June 29, 2001, therefore it should not be cited as a past element.

The predisciplinary hearing was held on July 29, 2002, and was concurred on the same day, therefore there could not have been a fair and impartial investigation.

The Form 1080 reveals that only a 14-day suspension was requested, but a removal was issued, a disciplinary action that was not proposed or concurred.

The emergency procedure action Article 16.7 issued to Grievant in conjunction with this action was sustained in USPS grievance #GOOC-1 G-D 02236144 proving that Charge #3, improper conduct/failure to follow instructions has no merit.

Charges #1 and #2 do not warrant a removal, and the discipline was too harsh, punitive and not corrective.

Because USPS management did not conduct a fair and impartial investigation, there was fatal error of the seven tests of just cause.

The Applicable Contract Law is Article 16, Section 1:

"... Discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause ..."

"... any such discipline or discharge shall be subject to the grievance-arbitration provided for in this agreement, which could result in reinstatement and restitution, including back pay."

The Postal Service neither cited nor considered any aggravating elements of past record. The Postal Service fired Clerk Rasco for a single act of alleged misconduct.

The Postal Service issued a removal that was never proposed by the immediate supervisor and was never concurred by a higher level management official as required by the National Agreement.

Disciplinary actions are governed by the due process requirements of 5 U.S.C. Chapter 75, the case law of the Merit Systems Protection Board (MSPB), and the Federal courts. Several factors come into play in determining an appropriate penalty. Included among them are the basic concepts of corrective, progressive discipline. That is, penalties must be selected with an eye to applying the minimum discipline likely to be necessary to correct the offense. One must also consider fairness and consistency. Penalties should be reasonably consistent with the discipline effected in similar situations against employees with similar records. This means that management has to carefully weigh a number of things in determining how severe a disciplinary penalty should be, including: nature and severity of the offense; the employee's previous record; the employee's potential for rehabilitation; penalties imposed on other employees in similar situations; and penalty guidelines.

Clerk Rasco's Fifth Amendment due process rights were violated in this case. The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law . . ." The Court of Appeals stated that "it is undisputed that the government employees here had a protected property interest in their employment." *King v. Erickson*, 89 F.3d at 1581 (Fed. Cir. 1996).

The core to due process is the right to notice and a meaningful opportunity to be heard, *Cleveland Bd. Of Ed. v. Loudermill,* 470 U.S. 532, 542 (1985). An individuals right to due process is violated if the agency does not follow the provisions of the Civil Service Reform Act of 1978, Chapter 75. The term Chapter 75 comes from Title 5 of the U.S. Code, Chapter 75. See 5 U.S.C. § 7501, *et seq.*

A removal is an adverse employment action that falls under Chapter 75. The agency must prove its case by a preponderance of the evidence which is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. It is the agency's burden to present sufficient evidence to convince the trier of fact that the substance of the charge is more likely true than not true. In order to do so, the Agency must consider the elements of (1) whether the misconduct alleged by the agency, which served as the basis of the decision to discipline the employee has in fact occurred; (2) if so, whether the specific action taken by the agency is for such cause as will promote the efficiency of the service, and (3) whether the action taken by the agency was reasonable. The Agency must prove the first two elements by a preponderance of the evidence, and then a simple reasonableness standard is applied to the third element which concerns the nature and severity of the disciplinary action. The Agency violated Rasco's due process rights when it terminated him.

For the reasons stated herein, the Petition for Writ of Certiorari should be granted. The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit should be reversed and this cause remanded for a trial.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED FEBRUARY 8, 2008

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20155
Summary Calendar

LARRY EDWIN RASCO,

Plaintiff-Appellant

v.

JOHN POTTER, Postmaster General, United States Postal Service; THE AMERICAN POSTAL WORKER'S UNION,

Defendants-Appellees.

LARRY RASCO,

Plaintiff-Appellant

v.

JOHN POTTER, Postmaster General, United States Postal Service; THE AMERICAN POSTAL WORKER'S UNION, AFL-CIO,

Defendants-Appellees.

Appendix A

LARRY RASCO,

Plaintiff-Appellant

v.

UNITED STATES POSTAL SERVICE,
through John Potter Post Master General,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:05-CV-34.

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant Larry Rasco appeals the district court's grant of summary judgment in favor of the United States Postal Service ("USPS") and the American Postal Workers Union ("Union"). For the following reasons, we AFFIRM.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

I. BACKGROUND

Appellant worked for USPS for twenty-eight years at the North Houston Mail Processing Center, where his final position was automation expediter. At all relevant times, Appellant was a member of the Union.

On September 9, 2002, USPS issued a notice of removal to Appellant for his alleged failure to follow instructions, including taking a break in the label room despite previous instructions to the contrary. The Union filed a grievance and pursued the matter to arbitration, where Arbitrator Stephen Dorshaw reduced the termination to a fourteen-day suspension. Arbitrator Dorshaw noted: "This is [Appellant's] final opportunity . . . since any subsequent Notice of Removal for future infractions of the same nature would clearly meet the 'progressive discipline' test."[1]

On February 27, 2004, USPS issued Appellant a second notice of removal for failure to follow instructions. The Union filed a grievance and USPS agreed to expunge the February 27 removal. Subsequently, on June 9, 2004, USPS issued a third notice of removal for failure to follow instructions. Specifically, USPS charged

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1. Under the collective bargaining agreement between USPS and the Union, any disciplinary actions are resolved under the concept of "progressive discipline," whereby the appropriate discipline depends in part upon the employee's disciplinary history. Thus, two employees charged with the same offense may receive different discipline depending upon their disciplinary history.

Appellant with improperly lingering in the label room on April 21 and May 10, 2004. The Union filed a grievance on Appellant's behalf regarding the June 9, 2004 notice of removal. Appellant submitted a four-page written statement to the Union, which the Union incorporated in its written grievance to USPS. USPS denied the Union's written grievance, and the matter proceeded to arbitration.

The Union assigned National Advocate Billie Glazebrook to Appellant's case. The arbitration occurred on February 24, 2005 before Arbitrator Mark Sherman. Both USPS and the Union called witnesses, including Appellant. A prior arbitration award-sustaining a letter of warning from May 2000 for failure to follow instructions-was admitted through the testimony of a USPS witness. Appellant's four page statement, however, was not introduced at the arbitration hearing. The Union submitted a post-hearing brief that Appellant agrees contained all relevant arguments in support of his case. On April 23, 2005, Arbitrator Sherman issued an award upholding Appellant's termination, noting "the totality and persistence" of Appellant's misconduct and referring to Arbitrator Dorshaw's previous warning to Appellant.

Appellant then asked the Union to appeal Arbitrator Sherman's award. The Union declined to do so, and Appellant initiated this suit against USPS and the Union. On January 4, 2007, the district court granted summary judgment for USPS and the Union. Appellant moved for reconsideration which was denied on January 26, 2007.

Appendix A

II. STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of summary judgment. *Melton v. Teachers Ins. & Annuity Ass'n of Am.*, 114 F.3d 557, 559 (5th Cir.1997). Summary judgment is appropriate only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir.1997).

III. CLAIMS AGAINST UNITED STATES POSTAL SERVICE

Appellant argues that USPS discriminated against him on the basis of race and in retaliation for prior equal employment opportunity ("EEO") activity in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") and, thereby, violated his due process rights.[2] We address each claim below.

A. Race Discrimination

Appellant is a white male. Appellant argues that he was discriminated against when: (1) from July 26, 2002 through September 11, 2002, he was issued instructions not to miss any dispatches and was not allowed to sit by

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2. Appellant mentions sex and age discrimination without any supporting argument. However, as the administrative law judge and district court found, Appellant abandoned his claims of sex and age discrimination during his deposition. Therefore, we need not address those claims.

the telephone located next to the dispatches; (2) on September 9, 2002 he was issued a notice of removal; and (3) on June 9, 2004 he was issued a notice of removal. Appellant's main argument is that he was treated more harshly than two Hispanic employees when all three were disciplined for ignoring instructions regarding usage of the label room, but only he was removed from his position and placed on leave without pay.

To establish a *prima facie* case of race discrimination, Appellant must establish that he was a member of a protected class, qualified for the position from which he was discharged, subjected to an adverse employment action, and treated less favorably than similarly situated individuals who were not members of his protected class. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Vaughn v. Edel,* 918 F.2d 517, 521 (5th Cir.1990). Appellant cannot establish a *prima facie* case because the evidence does not show that he was treated differently than similarly situated employees. All relevant employees were given the same instructions regarding timely handling of dispatches and not using the label room for breaks. Furthermore, while the Hispanic employees received a lesser punishment, they did not have Appellant's lengthy record of prior misconduct. Therefore, they are not similarly situated to Appellant, and Appellant fails to establish a *prima facie* case of race discrimination.

B. Retaliation

In addition to challenging USPS's disciplinary actions through the grievance process, Appellant also filed EEO complaints. Specifically, Appellant filed complaints alleging discrimination based upon race, age, sex, and retaliation regarding: a pre-disciplinary interview from April 2002 (which did not result in discipline), the September 2002 notice of removal, and the June 2004 notice of removal. The former complaint was resolved by an agreement between USPS and Appellant, and in the latter two complaints an administrative law judge found in favor of USPS. Appellant argues that he was discriminated against in retaliation for pursuing his EEO claims.

To establish a *prima facie* case of unlawful retaliation under Title VII, Appellant must show: "(1) that he engaged in an activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action." *Washburn v. Harvey*, 504 F.3d 505, 510 (5th Cir.2007). The district court found no evidence of a causal link between Appellant's protected activity and adverse employment action. We agree. There is no evidence that Appellant's supervisors were aware of his prior EEO activity. While only four months elapsed between the September 2002 notice of removal and Appellant's prior EEO complaint, this temporal proximity standing alone is not sufficient evidence of causation. *See Clark County Sch. Dist. v.*

Breeden, 532 U.S. 268, 273-74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001). Therefore, Appellant's retaliation claim is without merit.[3]

C. Denying Appellant's Motion was not an Abuse of Discretion

Finally, Appellant argues that the district court erred when it denied his motion to allow an untimely response to USPS's motion for summary judgment. We review the district court's determination for abuse of discretion. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 161 (5th Cir.2006). Federal Rule of Civil Procedure 6(b)(1) grants a district court discretion to allow untimely responses where "the party failed to act because of excusable neglect." Here, the district court granted Appellant three extensions of time to file his response before denying his untimely fourth motion. We hold that this ruling was not an abuse of discretion.

IV. CLAIM AGAINST AMERICAN POSTAL WORKERS UNION

We now turn to Appellant's claim that the Union breached its duty of fair representation. Appellant argues that the Union's representation was deficient

3. Appellant also presents a procedural due process claim against USPS based upon the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 7501 *et seq.* However, the CSRA is not applicable in the instant case because it governs appeals before the Merit Systems Protection Board and Appellant did not pursue such an appeal. Therefore, Appellant's claim lacks merit.

because it did not introduce his four-page written statement at the arbitration, and it permitted introduction of the prior arbitration award.[4] In response, the Union argues that Appellant's written statement did not need to be introduced because its contents were reflected in Appellant's testimony and post-hearing brief. Furthermore, the Union argues that USPS introduced the prior arbitration award to attack Appellant's credibility, and the arbitrator controlled its admissibility.

When considering the duty of fair representation by a union, "[t]he critical question is whether [the] union's conduct was arbitrary, discriminatory, or in bad faith, so that it undermined the fairness or integrity of the grievance process." *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 852 (5th Cir.1989). We agree with the Union that it fully and fairly represented Appellant through the grievance process, both before and during the arbitration. There is no evidence to suggest that the Union's conduct was arbitrary, discriminatory, or in bad faith.

Additionally, we agree with the district court that the Union's refusal to sue to vacate the award did not violate the duty of fair representation. Appellant's

4. Appellant briefly asserts a due process claim against the Union. However, as the district court noted, the Union is not a state actor and therefore not subject to the Fifth and Fourteenth Amendments. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988).

relationship with the Union is rooted in contract, and the Union Agreement provides that the Union does not have to sue to vacate an award unless the Union determines that the award was without a factual basis and contrary to the Union Agreement. The Union acted well within its contractual discretion. Therefore, the Union did not breach its duty of fair representation.

V. CONCLUSION

In light of the foregoing, the judgment is AFFIRMED in all respects.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED JANUARY 4, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-05-0034

LARRY EDWIN RASCO,

Plaintiff,

VS.

JOHN POTTER,

Defendant.

MEMORANDUM AND ORDER

I.

Before the Court are the motions to dismiss and for summary judgments [Inst. Nos. 32 and 36] of the defendants, John E. Potter, USPS, Postmaster General (USPS), and the American Postal Workers Union, AFL-CIO (Union). The plaintiff, Larry Edwin Rasco, has failed to respond to the USPS's motion in spite of several

motions for an extension.[1] *See* [Inst. Nos. 39, 41, 42 and 45]. The Court has reviewed the relevant documents on file, accepts the unchallenged factual allegations[2] in the motions as true and determines that the motions should be granted.

II.

The plaintiff was first employed as a Distribution Clerk for the USPS in February of 1976. Afterward, he held various positions up to the point of his termination on July 16, 2004, at which time he held the position of Automation Expediter. The record shows that the plaintiff's career was marked by frequent disciplinary actions. In fact, at the point of termination, claims that he failed to follow instructions that his work performance was unsatisfactory had been leveled against him. These allegations resulted in his termination.

On September 9, 2002, the USPS issued a letter of removal against the plaintiff based on unsatisfactory work performance and failure to follow instructions. The plaintiff was a member of the Union and grieved the disciplinary action. Although the Arbitrator found that

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1. The plaintiff's untimely motion for a fourth extension to respond to the USPS's motions is denied. The plaintiff timely responded to the Union's motion. See [Inst. No. 49]. A reply was filed by the Union and is recorded as Inst. No. 50.

2. The Court relies on USPS Exhibits 1-13 that are incorporated here by reference.

the plaintiff had committed the offenses, he reduced the punishment from termination to a 14-day suspension. On February 27, 2004, a second letter of termination was issued against the plaintiff. Again, the Union filed a grievance in the plaintiff's behalf, which grievance was resolved with an expungement of the February 27, removal letter. On June 9, 2004, a third letter issued. On that occasion, the plaintiff was charged with lingering in the Label Room on two occasions, conduct for which he had been previously warned. The plaintiff admitted that he had been eating in the label room on one occasion, but denied that his supervisor saw him. He also asserts that an Hispanic male was also guilty of that offense. In spite of his admission, the Union grieved the charge in the plaintiff's behalf. After an arbitration, the Arbitrator upheld the termination, thereby denying the grievance. When the Union failed to appeal the Arbitrator's decision, the plaintiff brought this suit and included the Union as a defendant.

The plaintiff proceeded by filing a formal complaint alleging discrimination based on race, age, sex and retaliation. On September 25, 2004, the EEO Administrative Judge issued a finding that there was no evidence of discrimination. The Administrative Judge's decision was implemented on October 5, 2005. Shortly thereafter, the plaintiff filed this suit.

Appendix B

III.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Id.* If the evidence rebutting the motion for summary judgment is only colorable or not significant probative, summary judgment should be granted. *Id.* at 249-50; *see also Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 108 (5th Cir. 1990), *cert. denied*, 112 S. Ct. 171 (1991).

Under Rule 56(c) of the Federal Rules of Civil Procedure, the moving party bears the initial burden of "informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987). Where the moving party has met its Rule 56(c) burden, the nonmovant must come forward with "specific facts showing that there is a *genuine issue for trial.*" *Matsushita*, 475 U.S. at 586-87 (quoting Fed. R. Civ. P.56(e)) (emphasis in original); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Leonard*, 828 F.2d at 294.

To sustain the burden, the non-moving party must produce evidence admissible at trial showing that reasonable minds could differ regarding a genuine issue of material fact. *Anderson*, 477 U.S. at 250-51; 255. *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). In deciding a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

IV.

The plaintiff abandoned his claims of gender (sex) and age discrimination during the taking of his deposition. Therefore, the Court grants summary judgment as to those claims. Remaining are the plaintiff's claims of discrimination based on race and retaliation.

In order to establish a *prima facie* case of disparate treatment discrimination based on race, a plaintiff must show that he is a member of a protected class, he was qualified for the position from which he was discharged, he was subjected to an adverse employment action, and that he was treated less favorably than similarly situated individuals who were not members of his protected class under similar circumstances. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Wheeler v. B L Dev. Corp.*, 415 F.3d 399, 406 (5th Cir. 2005).

To establish a *prima facie* case of retaliation, a plaintiff must show that he engaged in activity protected by Title VII, that a reasonable person would find the

challenged action materially adverse, and that a causal link exists between the protected activity and the challenged action. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006).

V.

In his pleadings, the plaintiff alleges that he was terminated based on race and in retaliation for his claims of discrimination. The record shows that the plaintiff was repeatedly disciplined and subsequently terminated for the repeated violation of specific instructions. In one or more instances, the plaintiff admitted that he engaged in the violative conduct but claimed that others, who engaged in similar conduct, were treated more favorably. Specifically, the plaintiff asserts that an Hispanic employee was treated more favorably. The record shows that both the plaintiff and the Hispanic male were given identical instructions. However, because the plaintiff had two suspensions for the identical conduct and the Hispanic did not, his discipline was different. Beyond this comparative, the plaintiff has failed to show that he was treated less favorable for similar conduct.

Likewise, there is no evidence that the September 9, 2002, Notice of Removal letter was in retaliation for the plaintiff's earlier EEO complaint. The plaintiff relies upon a remark made by a fellow employee upon his return from a suspension. That fellow employee, however, was not one of the plaintiff's supervisors. Moreover, there is no evidence that the fellow employee

had any connection to the plaintiff's EEO complaint, grievances or the arbitration. Hence, there is no evidence of a causal link between the remarks of the fellow employees and the plaintiff's EEO activity. Finally, there is no evidence that the plaintiff's supervisors were aware of his prior EEO activities. Because there is an absence of evidence, beyond mere allegations, the plaintiff's claim of retaliation fails.

VI.

The plaintiff's sole complaint against the Union focuses on the Union's failure to appeal his unfavorable arbitration. It is noteworthy that the plaintiff's relationship with the Union is based in contract. Hence, unless there was a contractual duty to appeal the Arbitrator's decision, no violation of the agreement occurred. The Union Agreement appears to leave the matter to the discretion of the Union. Article 15, Section 5.A.6 provides that the Union need not seek to vacate an arbitration award absent a determination by the Union that the award was without an factual basis and contrary to the Agreement.[3] The plaintiff has not presented evidence that the decision of the Union was erroneous, as a matter of law. At most, the plaintiff might argue abuse of discretion on the part of the Union.

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3. The plaintiff's "due process" claim fails for the very reason stated by the Union— the Union is not a state actor and therefore not subject to the Fifth and Fourteenth Amendments. *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988); *See also Public Utilities Comm'n Dist. of Columbia v. Pollak*, 343 U.S. 457, 461 (1952).

However, a decision by the Union that, amounts to an abuse of discretion, does not violate the Union's duty to provide fair representation to the plaintiff in the grievance and arbitration proceedings. And, there is no evidence in this case of bad faith on the part of the Union.

Conclusion

Based on the evidence presented and the lack of evidence to the contrary, the Court finds and holds that the USPS and Union's motion for summary judgment should be, and they are Hereby, Granted.

It is so Ordered.

SIGNED and ENTERED this 4th day of January, 2007.

s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

APPENDIX C — DECISION OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HOUSTON DISTRICT OFFICE, HEARING UNIT DATED SEPTEMBER 27, 2005

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
HOUSTON DISTRICT OFFICE
HEARING UNIT

EEOC No. 330-2005-00115X

Agency No. 4G-770-0356-04

LARRY RASCO,

Complainant,

JOHN E. POTTER, POSTMASTER GENERAL OF THE UNITED STATES,

Agency.

DECISION
[29 C.F.R. § 1614.109(g)]

INTRODUCTION

This decision is issued without a hearing. Jurisdiction to conduct hearings on discrimination complaints by federal employees is conferred by Equal employment Opportunity Commission (EEOC) regulations, codified at 29 C.F.R. § 1614.109. Pursuant

to 29 C.F.R. § 1614.109(g), the Administrative Judge may issue a decision without a hearing (summary judgment).

On October 5, 2004, Larry Rasco (Complainant) filed a formal complaint alleging discrimination based on race, sex, age, and retaliation. After the Agency's investigation, Complainant requested a hearing before an EEOC Administrative Judge.

On May 10, 2005, the Administrative Judge issued a Notice of Intent To Issue Decision Without a Hearing. The Administrative Judge served a copy of the Notice on Complainant, Complainant's Representative and the Agency. Complainant filed a response on June 1, 2005. The Agency filed a response to Complainant's response on June 9, 2005. On June 14, 2005, Complainant filed a Motion to Strike Agency's Response. After careful review of the Agency's response, Complainant responses, and Record of Investigation, I have determined that a decision may be issued, based on the record, without a hearing.

ISSUE

Whether Complainant was discriminated against on the basis of his race (Caucasian)[1], sex[2] (male),

1. CR-Complaint Aff.1

2. Mr. Rasco stated in his affidavit that sex and age were not factors in the current complaint. Therefore, they will not be discussed in this decision. IA-A/13.

age (48/DOB: 3/24/56), and retaliation (prior EEO activity)[3], when on July 1, 2004, he was issued a Notice of Removal for Failure to Follow Instructions, effective July 16, 2004.

LEGAL ANALYSIS

EEOC regulations for summary judgment are patterned upon procedures and guidelines set forth in the Federal Rules of Civil Procedure. Under Rule 56, summary judgment is appropriate if the fact finder determines that, under applicable substantive law, there is no issue of material fact in genuine dispute such that the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To avoid summary judgment, the opposing party must identify record evidence that will allow a reasonable fact finder to find for him at trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court in *Celotex Corp. v. Catrett*, 477 U.S. 316, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986), stated: "In our view, the plain language of Rule 56c mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . ." *Id.* at 322. The Court added that "In such a situation, there can be 'no genuine issue as to any

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3. Mr. Rasco listed retaliation as a purview on his formal complaint. However, the Agency failed to bring it forward for investigation on the "Issues to be Investigated." IF.

material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* at 323. The party opposing summary judgment may not rest on mere allegations or denials, but must offer specific facts indicating the presence of a genuine issue for trial. *Anderson*, 477 U.S. at 248.

FACTUAL BACKGROUND

Mr. Rasco was a General Expeditor, PS-06, with the Agency's North Houston Processing and Distribution Center located in Houston, Texas. IA-A/1[4], Mr. Rasco entered duty with the Agency on January 9, 1982. IE-1. At all time relevant to this complaint, Richard Melchor (Hispanic) was the Manager of Distribution Operations. IA-B/8. Mark Wagner (White) was the Supervisor of Distribution Operations and Mr. Rasco's supervisor. IA-C/6.

On April 21, 2004, Manager Melchor observed Mr. Rasco in the label room eating. Expeditors are not required to seek permission each time they enter the label room but are forbidden to take lunch or breaks. IA-B/10. Mr. Rasco had previously received discipline

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4. Abbreviations used in referencing the record are: AJE – Administrative Judge Exhibit; AB – Agency Exhibit; CB – Complainant Exhibit; IA – Investigation Affidavit; IE – Investigation Exhibit; IF – Investigation File; IR – Investigation Report; AE – Agency Exhibit; AM – Agency Motion; CR – Complainant Response and CB – Complainant Exhibit.

and been counseled not to use the label room as a break and/or lunch room. Mr. Rasco received a 14-day suspension on May 9, 2003, for Unsatisfactory Work-Performance Failure to Follow Instructions for the April 21, 2004 incident. On May 10, 2004, MDO Melchor observed Mr. Rasco in the label room. Because of prior incidents, MDO Melchor contacted SDO Wagner. SDO Wagner proceeded to the label room and Mr. Rasco was still there. When SDO Wagner entered the label room, Mr. Rasco left without obtaining any labels. Later that night, SDO Wagner conducted a pre-disciplinary interview. IE-4. When questioned about being in the label room, Mr. Rasco stated that he had gone in to get some labels, but met Roger Lopez[5] with the same labels, so he sat down to tie his shoes when Manager Melchor entered. When asked how long he had been in there, Mr. Rasco stated, not more than four or five minutes. When questioned about what time he clocked in, Mr. Rasco stated eleven o'clock. When questioned about his whereabouts from eleven until he was spotted in the label room, Mr. Rasco stated that he was walking the unit, because he did not have anything to dispatch. There were at least fifteen containers (APC's) of mail that needed to be dispatched from the unit. IE-4. On July 1, 2004, SDO Wagner issued Mr. Rasco a Notice of Removal for Failure to Follow Instructions with the concurrence of MDO Melchor. IA-B/9 & IE-3.

Mr. Lopez was given an investigative interview by his supervisor, SDO Phil Arredondo. IA-B/10. SDO

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5. Rogelio Lopez. IE-5/2.

Arredondo reduced the investigative interview to a discussion because he did not witness Mr. Lopez in the label room and Mr. Lopez had no previous incidents of being in the label room. *Id.*

In addition to this complaint, Mr. Rasco has filed five formal and seven informal EEO charges. IE-2.

CONCLUSIONS OF LAW

Mr. Rasco has alleged disparate treatment when on July 1, 2004, he was issued a Notice of Removal for Failure to Follow Instructions, effective July 16, 2004 on the basis of his race. The legal standard governing this type of case for proving disparate treatment can be found in the United States Supreme Court's decision of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The complainant possesses the initial burden to establish a *prima facie* case. *McDonnell Douglas*, 411 U.S. at 802. *Burdine*, 450 U.S. at 252. If met, the burden of production, to articulate a legitimate nondiscriminatory explanation for the disputed conduct, shifts to the Agency. *Burdine*, 450 U.S. at 253-54. The complainant possesses the ultimate burden to prove, by preponderance of the evidence, that the proffered explanation is a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). *Burdine*, 450 U.S. at 256. In order to establish a *prima facie* case of discriminatory treatment regarding terms or conditions of employment, Complainant must show that: (1) he is a member of a class protected under Title VII; (2) he was subjected to an adverse employment

action; and (3) he was treated differently or less favorably than persons otherwise similarly situated who are not members of the protected class. *See, e.g., McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282-83 (1976).

The record is undisputed that Mr. Rasco belongs to the race protected class and he was issued a Notice of Removal for Failure to Follow Instructions, effective July 16, 2004. Mr. Rasco identified Rogelio Lopez (Hispanic/ no prior EEO activity) and Ernesto Gomez (Hispanic/ no prior EEO activity) as comparators. Although both Mr. Lopez and Mr. Gomez were outside of Mr. Rasco's race protected class, they are not similarly situated. Specifically, Mr. Gomez was not observed in the label room eating or sitting idle nor did he have previous discussions or discipline for being in the label room. Mr. Gomez who was observed in the label room on May 10, 2004, did, in fact, receive an investigative interview by his supervisor, SDO Phil Arrendondo. Moreover, because Mr. Lopez did not have previous incidents in the label room, he received a "discussion". Additionally, Mr. Lopez and Mr. Gomez both had different supervisors than Mr. Rasco. Thus, Mr. Rasco has failed to show any non-Hispanic expeditors who had previous discussions and a live 14-day suspension for taking breaks or lunch in the label room and who were subsequently observed idle in the label room did not receive a Notice of Removal. Therefore, Mr. Rasco failed to establish a *prima facie* case that he was issued a Notice of Removal because of his race.

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Even assuming that Mr. Rasco established a *prima facie* case of discrimination, the Agency articulated legitimate non-discriminatory reasons why Mr. Rasco was issued a Notice of Removal. Although expeditors were not required to seek permission each time they entered the label room, they were prohibited from taking breaks or lunch in the label room. Mr. Rasco had previously received discipline and been counseled not to use the label room as a break and/or lunch room. Moreover, Mr. Rasco had a live 14-day suspension for eating in the label room on April 21, 2004. The evidence revealed that discipline is progressive and the Notice of Removal was the next step for Mr. Rasco. Thus, Mr. Rasco did not present any evidence raising a material factual dispute as to whether the Agency's reasons were false and whether discrimination was the real reason he was issued a Notice of Removal. Therefore, I find that he was issued a Notice of Removal because of his blatant failure to adhere to Agency policy not his race.

Retaliation Discrimination

Mr. Rasco has alleged that he was issued a Notice of Removal for Failure to Follow Instructions, effective July 16, 2004 in retaliation for his prior EEO activity. In deciding Complainant's allegation of retaliation, the following analytical framework was employed. Complainant has the initial burden or establishing a *prima facie* case of retaliation by showing: (1) that he opposed discriminatory practices of participated in protected EEO activity, (2) the Agency was aware of his protected activity, (3) the Agency took adverse

employment action against him, and (4) the adverse employment action followed his protected activity within such period of time that retaliatory motive can be inferred. If established, the Agency must articulate a legitimate, non-retaliatory reason for its action. Lastly, the Complainant must demonstrate that the Agency's proffered reason is a pretext for unlawful retaliation.

The record revealed that Mr. Rasco had prior EEO activity. The record is undisputed that he was issued a Notice of Removal. The record further revealed that SDO Wagner and MDO Melchor were unaware of his prior EEO activity. Mr. Rasco argues that MDO Melchor was aware of his prior EEO activity because of a comment he made when Mr. Rasco returned to work from a previous Notice of Removal issued September 11, 2002. Specifically, MDO Melchor made a comment about beginning "round two". Mr. Rasco also argues that SDO Wagner had to be aware of his prior EEO because of a mediation agreement management should have informed him [SDO Wagner]. Other than bare allegations and assumptions by Mr. Rasco, I do not find that SDO Wagner and MDO Melchor were aware of his prior EEO activity. Therefore, I find Mr. Rasco cannot establish a *prima facie* case of retaliation discrimination.

Assuming Mr. Rasco established a *prima facie* case of retaliation, the Agency articulated a legitimate non-retaliatory reason for his removal. Thus, I do not find that Mr. Rasco raised an inference of retaliation

regarding the removal. Therefore, based on the foregoing, I do not find that Mr. Rasco's removal was based on a retaliatory motive.

CONCLUSION

I find **NO DISCRIMINATION** based upon race or retaliation.

APPENDIX D — DECISION OF ARBITRATOR
DATE OF HEARING FEBRUARY 24, 2005
DATE OF AWARD APRIL 23, 2005

REGULAR ARBITRATION PANEL

Grievant: Larry Rasco

Post Office: Houston AMC

USPS Case No: G00C-1G-D 04160862

APWU Case No: D04-169

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO

BEFORE: Mark R. Sherman, Arbitrator

ISSUES

Was there Just Cause to issue the Grievant a Notice of Proposed Removal dated June 9, 2004, and if not what shall the remedy be?

Appendix D

RELEVANT CONTRACTUAL PROVISIONS

Agreement between the United States Postal Service and American Postal Workers Union

ARTICLE 15: Grievance - Arbitration

ARTICLE 16: Discipline

FACTS

The Grievant, Mr. Larry Rasco, was an Expediter with almost 30 years of service at the time of the incident that led to his Removal. While Mr. Rasco had a long and varied career with the Postal Service, at the time of his Proposed Removal, he had several elements of live discipline on his record. Most significantly, this included a 14-day suspension that involved conduct very similar to that in question here. Although there were important factual elements of this case in dispute, the charges against the Grievant were encapsulated in the Notice of Removal he was issued on June 9, 2004. A substantial portion of that letter is reproduced below.

CHARGE #1: You are charged with Failure to Follow Instructions

Specifically, you are assigned work duties at North Houston P & DC with a reporting schedule from 11:00 p.m. until 7:30 a.m. On May 10, 2004 at approximately 12:05 a.m. Manager Melchor called to inform me he observed you in the label room. Manager Melchor

questioned you about being in the label room, you did not answer but left the label room empty handed. Manager Melchor also observed you in the label room on April 21, 2004 eating. When given an opportunity to explain your actions you stated, "I had gone back there to get labels and met Roger who had gotten the same labels and was just leaving. Roger had just left and I sat down to tie my shoes when MOO Melchor came in." When questioned about how long your had been in the label room you stated, "Not more than four or five minutes." When asked what you had been doing from 11:00 p.m. until you were seen in the label room you stated, "I was walking the unit, I didn't have anything to dispatch." You have previously been counseled not to use the label room as a break and/or lunchroom having received a 14-day suspension for the same offense. As a result of your actions you are charged accordingly.

In addition, the following elements of your past record will be considered in taking this action:

You were issued a 14-Day Suspension dated May 9, 2003 for Unsatisfactory Work Performance/Failure to Follow Instructions

With the assistance of the Union, Mr. Rasco grieved his Removal. The grievance remained unresolved and was appealed to Arbitration under the provisions of Article 15 of the National Agreement. The Hearing of this matter was conducted on February 24, 2005 in Houston, Texas. At that Hearing, the Parties were offered a full and fair opportunity to present all relevant

evidence and testimony. At the conclusion of the Hearing, the Parties agreed to file post-hearing briefs. The Record of the Hearing was closed when the Arbitrator received those briefs in early March. The decision was delayed several days beyond the 30-day time limit prescribed in the relevant Agreement. The Arbitrator appreciated the forbearance of the Parties in allowing him this brief delay in the issuance of the Award.

POSITION OF THE POSTAL SERVICE

The position of the Postal Service was encapsulated in the following excerpt from the post hearing brief reproduced below:

This is a discipline grievance and the burden of proof is on management to show just cause existed when issuing the grievant a notice of removal dated June 9, 2004, for Failure to Follow Instructions. The file shows the grievant had been disciplined several times for being in the label room and he continues to be defiant with regards to management repeated instructions. The grievant was charged with failure to follow instructions. The grievant is a former supervisor who has given instructions to other employees and expected them to follow his instructions. Now that he is no longer a supervisor, he continues to disregard the instructions of his supervisor.

The grievant received a Letter of Warning dated May 24, 2000, for Failure to Follow Instructions. The grievant

filed a grievance and the case was arbitrated before Arbitrator Toedt, who denied the grievance. The grievant was issued a Notice of Removal dated September 9, 2002, for Unsatisfactory Work Performance/Failure to Follow Instructions. The grievant filed a grievance and the case was arbitrated before Arbitrator Dorshaw, who reduced the removal to a 14-day suspension on May 9, 2003. In the arbitration ruling the Arbitrator stated in his award, "This is the grievant final opportunity to validate his testimony that he can change his attitude and demonstrate a satisfactory level of performance, by following all supervisory instructions in order to keep his job with the Postal Service, since any subsequent Notice of Removal for future infractions of the same nature would clearly meet the progressive discipline test."

During testimony, the grievant admitted he was eating in the label room on April 21, 2004, even though he had a live 14-day suspension for this same type of offense. This admission alone give management just cause to issue the grievant a removal. The union contends discrimination is the sole reason for issuing the grievant discipline. Joint two (2) on pages 50 through 59, shows the grievant filed grievances claiming harassment on five (5) different supervisors. If one is, incline to believe the grievant these five supervisors along with Supervisor Wagner and Labor Relations Specialist Beasley, have reasons to discriminate or lie on him. The United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) held that: (a) the employee had the initial burden of proof in matters

where the employee challenges an employer's action based on an allegation of discrimination; (b) the employee must produce evidence of disparate treatment from which it may be inferred that there was a causal connection between the discharge and the employee's protected status; (c) the employer will be considered to have rebutted that inference, if it articulates a legitimate, nondiscriminatory reason for the discharge; it is then up to the employee to prove that the reason given by the Employer was a pretext. While the union contends management did not issue expediter Lopez a removal, they failed to show that expediter Lopez had received any prior discipline for "Failure to Follow Instructions." Union and management both agreed expediter Lopez received a pre-investigative interview.

Mr. Arbitrator, while it appears inconceivable that the grievant left the label room at approximately 12:05 a.m. and when Supervisor Wagner went looking for the grievant he was back in the label room. This is exactly what happened. Looking at the facts in this case why would Supervisor Wagner fabricate a story on the grievant. After all, he caught him on April 21, 2004, eating in the label room and only gave him a discussion. The union would like you to believe Supervisor Wagner was taking orders from Supervisor Melchor and Melchor had a personal vendetta against the grievant. However, both testified they have been each other supervisor numerous amount of times in their Postal career; therefore, there would have been no reason for Supervisor Wagner to fear Supervisor Melchor. The file also shows the grievant has not filed more allegations

of discrimination against Melchor than any other supervisor.

The record and testimony is clear, the grievant when he received an unfavorable decision from Arbitrator Toedt, he made false allegations against management advocate. The grievant received a 7-days suspension for making these false allegations and the union decline to file a grievance on the grievant behalf. The only one who has something to gain by not being truthful is the grievant. Clearly, from looking at the file the grievant has a history of filing discrimination grievances. He has filed against five (5) different supervisors and now testifies Supervisor Wagner and Beasley are lying against him.

Mr. Arbitrator, while one would have sympathy for a long-term employee losing his job. The grievant has not and will not follow the instructions of his supervisors. The grievant has been receiving discipline for failure to follow instructions since May of 2000. The Postal Service cannot continue to employ an employee who refuses to follow instructions. While the union might contend, the grievant is a long-term employee and is a good worker. The grievant was not discipline for work performance or attendance. The union cannot and will not tell you the grievant always follow the instructions of his supervisor. Any sympathy extended to the grievant must come from the Postal Service, not the arbitrator.

After listening to the testimony and reviewing the documents, Mr. Arbitrator you will find just did exist in issuing the grievant a notice of removal. Therefore the

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Postal Service request that you uphold Arbitrator Dorshaw's award and deny this grievance in its entirety.

POSITION OF THE UNION

The position of the Union was spelled out very thoroughly in the following excerpts from its post-hearing brief.

Deanne Simmons testified for the Union. Deanna was the steward present at the Pre-investigative interview held on May 10, 2004. A copy of Deanna's Pre-investigative report was a part of the package and she testified to its authenticity. Mrs. Simmons says the interview was held the same day as the infraction occurred. She stated that during the interview that Supervisor Wagner stated that Mr. Rasco couldn't have been gone for too long because he (Mr. Wagner) had just seen him (Mr. Rasco) in the unit at 12:10. Mrs. Simmons filled out this document at the time of the interview and she has no motive to record false information or embellish on the truth as she appeared to be a credible witness. Somewhere between the night of the incident, the pre-investigative hearing held on 5/10/03, and Mr. Wagner's report that was done some time after the fact. Supervisor Wagner decided to change his story in order to give his case More Merit. No time during the pre-investigative interview was it mentioned that Supervisor Wagner himself found Mr. Rasco in the label room. No where in the case file was it ever argued that Mr. Rasco left the label room and then returned.

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MDO Melchor wrote in his statement and testified under oath that when he entered the label room at 00.02 and found Mr. Rasco he asked him what he was doing he received no response and that Mr. Rasco exited the label room at that time. He further stated and testified that he informed both Mr. Rasco and Mr. Lopez supervisors. Mr. Wagner also testified that he was contacted by MDO Melchor some minutes later and he also testified that it took Mr. Melchor 5 or 6 minutes to return to his work area to make that call. It is unclear as to why Supervisor Wagner would say he saw Mr. Rasco in the label room except that there were several days involved in this investigation and maybe Mr. Wagner got his days mixed up. On the night of the Incident supervisor Wagner testified that there were dispatches of outgoing mail on line needing to be dispatched. But testimony revealed that the day in question was on a Sunday night for Monday and that there were no outgoing dispatches made on Sunday night. When Supervisor Wagner was asked about which day of the week it was that the incident took place he said he didn't know, but when it was revealed that this was a Sunday night Monday he admitted that no outgoing dispatches were made. He made a mistake then just like he made a mistake as to which outgoing dispatches were made. He made a mistake then just like he made a mistake as to which night he observed Mr. Rasco in the label room. Mr. Wagner basically admitted to being caught in the discrepancy about the dispatches and other evidence disputes his claim about personally finding Mr. Rasco in the label room at 12:15. Mr. Wagner also testified that the next dispatch was not to be made until 12:45 with

1:00 a.m. departure to Beaumont & Bryant. This testimony contradicts Supervisor Wagner's earlier claim that there were 10 to 15 dispatches of outgoing mail on line at 12:10. Supervisor Wagner further testified that Mr. Rasco had to enter the label room with permission and the again he was also able to enter the label room without permission as this was a part of his everyday job assignment. This statement in itself is questionable. How and when is the employee to determine when he can enter the label room with permission and when can he enter the label room without permission. He further testified that there were no written instructions for Mr. Rasco not to enter the label room without permission.

Mary Montgomery also testified that there were no written instructions for Mr. Rasco not to enter the label room. By confirming, that there was no written instruction not to go into the label room and the testimony of Supervisor Wagner that Mr. Rasco did not necessarily have to get permission to enter the label room the Union can only conclude that there was no episode of failure to follow instructions. Management has failed to prove that Mr. Rasco was on a break or at lunch. They found no food in his possession and as for him sitting in the chair he was merely tying his shoe as he has claimed all along. Mr. Rasco and the Union are honored that someone as high ranking as Mr. Beasley was ready and willing to testify in order to rebut, refute or otherwise discredit Mr. Rasco's credibility, however his testimony has no relevance to this case. The introduction of an arbitration award and disciplinary action dated back in 2001 was a bad act of faith by

management. There was no objection by the union at the introduction of this four year old action for a couple of reasons. First of all arbitrator Sherman had demonstrated through out the course of this hearing that he was capable of hearing testimony whether it was deemed new discovery or what ever and giving such testimony due consideration as to what purpose it served. The purpose of having Mr. Beasley testify was only for Mr. Beasley to discredit Mr. Rasco however Mr. Beasley has nothing to do with this case. The credibility problem lies with management. Management has two witnesses with completely different stories regarding Mr. Rasco being in the label room. Supervisor Wagner has made statements that contradict himself. Management's attempt to discredit Mr. Rasco are therefore irrelevant since it is the testimony of Supervisor Wagner that is obviously not credible. It is undisputed that Mr. Rasco has filed many grievances on harassment by management and many against MDO Melchor and the Unions position is that it is pure retaliation for the many grievances filed by Mr. Rasco that has motivated postal management to seek his removal.

Mr. Arbitrator the burden of proof is on management and the key question here is the proof that Mr. Rasco was in the label room on a break or lunch. Not only does Mr. Rasco dispute the claim of him being in the label room at 12:10 but it also disputed by Union Steward Deanne Simmons and her record of Mark Wagner himself stating otherwise. Management has failed to meet it's burden of proof by clear and convincing

evidence. However the Union has proven continued harassment by management and MDO Melchor. Management has not disputed the serious allegations of continued harassment by management and MDO Melchor. The verbal threat or warning from Melchor to Rasco about the statement about Mr. Melchor telling Mr. Rasco "you don't know what I do outside the Post Office so don't mess with me" was not questioned. The fact that Mr. Rasco's first day back to work after his removal on 9/11/02 Mr. Melchor welcomed him to round two was not disputed. All of the aggressions from Mr.. Melchor toward Mr. Rasco establishes motive for retaliation against Mr. Rasco. As an acting MDO Mr. Melchor notified SDO Wagner and Arrendondo that clerk Rasco and Lopez of being in the label room. Disciplinary action was taken as a result of MDO Melchor against Mr. Rasco only and no disciplinary action was ever taken against Mr. Lopez the other employed observed leaving the label room without labels in his had at the same time Mr. Rasco was observed. Supervisor Wagner requested the discipline due to the coercion of MDO Melchor and then MDO Melcher concurred the discipline. The Union and Mr. Rasco believe in the fairness of the grievance procedure process and are confident that the testimony given during this hearing has vindicated Mr. Rasco of any wrong doing specifically, not guilty of failure to follow instructions. Arbitrator Sherman the Union respectfully request that you sustain this grievance in its entirety and grant the requested remedy.

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DISCUSSION AND OPINION

This case featured two important mitigating factors that operated together in strong support of Mr. Rasco's grievance. The first was the Grievant's roughly 30 years of seniority. When someone works most of their life for one employer, there is an obvious presumption that the grounds for their discharge must be substantial. The second factor operating in the Grievant's favor was that his misconduct in this case was not substantial at all. He was in an area of the facility where he was told not to be unless he was performing his duties. Whether or not he remained for a few more minutes after being told to leave or left immediately as he asserted, his actions on May 10, 2004, view in isolation, would probably not justify the discharge of a relatively new employee, let alone one with nearly 30 years of service. However, Mr. Rasco's actions cannot be viewed in isolation in the present case. Unfortunately for the Grievant, it was the totality and persistence of his misconduct that undermined the very mitigating factors that would have otherwise guaranteed his reinstatement.

The Arbitrator will never understand why Mr. Rasco repeatedly gravitated to an area of the facility where he was told not to "hang out" or take breaks. Even if the Arbitrator believed that Mr. Rasco were completely blameless in his heavily grieved disputes with supervision, he still found it incredible that the Grievant put himself in a position where his actions could only be interpreted as a blatant defiance of authority. By all accounts, his penchant for the label room and his

accompanying defiance of authority had become a characteristic pattern. Management sought to correct the pattern on several previous occasions, but to no avail. Apparently, Mr. Rasco ignored the warnings offered by both the supervisors as well as the Arbitrators who were called upon to evaluate his misconduct on previous occasions.

Unfortunately for the Grievant, by the time this case was heard, he had developed a history of being judged in the wrong by people for whom the Arbitrator has considerable respect. Apart from Labor Relations Specialist (and Former Union Official) Beazley, the list also included Arbitrators Toedt and Dorshaw. Indeed, this Arbitrator was influenced by the tone of his colleague Arbitrator Dorshaw who unequivocally pointed out to Mr. Rasco that he was being given a last chance. Mr. Rasco either did not read that Arbitrator's decision or did not understand how it would impact any subsequent Arbitrator who found that the Grievant had yet again engaged in the same misconduct. In short, this Arbitrator could not give Mr. Rasco yet another last chance without disrespecting people whom he holds in high regard.

In retrospect, the Grievant must realize that even when the relevant misconduct is relatively trivial as it was in this case, there is still a "last straw" effect that operates. In this case, the last straw was indeed, a very tiny one. However, the Grievant's took many liberties in loading up the proverbial "camel" with prior discipline. As a consequence, he left the Arbitrator with

no alternative. The Agency's use of progressive discipline in this case was meticulous and well documented. There was no doubt in the mind of the Arbitrator that Mr. Rasco was put on notice that he had to obey the reasonable order to remain clear of the label room unless he was there as part of his official duties. Nevertheless, as recently as a few weeks before his eventual removal, he was found taking a meal break in that very location. It was almost as though the Grievant wanted to see just how far he could push his supervisors before they yet again disciplined him for his insubordination. Unfortunately for the Grievant, he found out the answer to that question. Even more unfortunately for him, he put himself in a position where this Arbitrator was unable to give him yet another chance.

AWARD

For the reasons spelled out above, the Grievance is denied.

s/ Mark R. Sherman
Mark R. Sherman, Arbitrator